Local Union 15, International Brotherhood of Electrical Workers, AFL–CIO *and* Commonwealth Edison Company. Case 13–CB–17070

February 27, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 23, 2003, Administrative Law Judge Martin J. Linsky issued the attached decision. The General Counsel and the Charging Party Employer each filed exceptions and a supporting brief, and the Respondent Union filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. February 27, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, concurring.

I join my colleagues in adopting the judge's findings that the Respondent Union did not violate the Act in any respect. For the reasons stated below, I find that the parties did not engage in sufficient bargaining to support the General Counsel's burden to establish by a preponderance of the evidence that the Respondent bargained in bad faith during negotiations regarding a voluntary timeoff (VTO) program. Additionally, I conclude that the Union also did not violate Section 8(b)(1)(A) of the Act by threatening and fining employee members who participated in the VTO program that the Employer later implemented because the Union was privileged, under *Scofield v. NLRB*, 394 U.S. 423 (1969), to discipline employees who availed themselves of this voluntary benefit.

FACTS

The Employer operates two call centers in the Chicago, Illinois area at which it employs 320 full-time and 130 part-time customer service representatives represented by the Union. The parties' successive collective-bargaining agreements, as relevant here, permitted employees to submit requests for timeoff without pay, known as "4x" time, to their supervisors. There were problems over the years with the Employer's low-level supervisors' handling of requests for "4x" time. Employees complained that their supervisors have failed to act evenhandedly in considering these requests. The Employer also was dissatisfied that its supervisors were granting or denying "4x" time without regard to overall operating needs.

To address these concerns, the parties, on April 7, 1997, executed a written letter of agreement that provided, in pertinent part, as follows:

> In addition, the issue regarding excused unpaid (4x) time for personal reasons has been addressed. Both parties agree that employees may, on a volunteer basis, be released during certain periods of the week, as determined by Management, without pay. Management will make every effort to schedule excused unpaid time equally among call centers. The determination as to how many employees should be released will be decided by the Call Center Management.
>
> Company and Union representatives will jointly work toward developing guidelines which addresses both parties interests. [sic] These guidelines shall be in place prior to enacting the above provision.

Implementation of the VTO program pursuant to this agreement was effectively dormant for over 4 years and the parties never developed the requisite guidelines.

The Employer's new director of customer service, Phyllis Batson, concluded in mid-2001 that the Employer's two Chicago call centers were overstaffed and that the Employer needed a more centrally administered VTO program than "4x" time offered. Although she was not yet aware of the parties' 1997 agreement regarding the creation of a VTO program, Batson included the topic on the written agenda for union discussions on September 19, 2001.[1] The parties discussed this issue for no more than 15 minutes during that meeting. The Union's vice president, Richard Joyce, told the Employer that the

[1] No exceptions were filed to the judge's finding that this case is not appropriate for deferral to the parties' grievance-arbitration procedure.

[1] All dates are in the latter part of 2001 or early 2002, unless otherwise noted.

Union was not interested in a VTO program for full-time employees. The Union asked the Employer several questions about how the proposed VTO would affect employees who are called back to work in emergency situations and what would happen if the Employer denies an employee paid vacation time on a particular day, and later grants the employee VTO without pay for that same day.

Before the parties again discussed this issue, Batson became aware of the April 1997 agreement. She raised the subject of a VTO program at the end of a meeting on November 14, and presented the Union with guidelines for it. Joyce reiterated that the Union was not interested in a VTO program for full-time employees because he thought that they should get paid for working a full 40-hour week. After the Employer showed Joyce the April 1997 agreement, Joyce said that he might be willing to review a pilot program covering only part-time employees. The discussion of the VTO program lasted only about 5 minutes during the November 14 meeting.

Thereafter, on November 19, the Employer's labor relations liaison, Deborah Schwarz, went to the Union hall on an unrelated matter. She ran into Joyce and asked him about VTO. Joyce again replied that the Union was not interested in having a VTO program. However, he also asked Schwarz whether the creation of a VTO program would adversely affect the employees' pension plan.

On December 18, Schwarz called Joyce about this subject. After Joyce said that he was only willing to consider a VTO for part-time employees, Schwarz informed him that the Employer was establishing such a program for all the unit employees on December 21. The Employer then implemented the program on December 21. The Union filed a grievance over the matter that same day, but did not file an unfair labor practice charge.[2]

On December 20, the Union sent a letter to the unit employees requesting that they not participate in the Employer's VTO program. After sending additional letters in early 2002 warning employee-members that it would fine them for participating in this program, the Union subsequently fined those who utilized the VTO either $218 if they appeared at the Union's trial and $281 if they did not. The Union stated at the hearing that it planned on filing suit in small claims court to collect fines from 71 members who participated in the VTO program. Additionally, union steward Cogswell testified that she may have told employees that the Union "would pull their cards" if they refused to pay the fines.[3] The Union has not expelled from membership any employee who participated in the program.

REFUSAL TO BARGAIN ALLEGATIONS

The complaint alleges that the Union violated Section 8(b)(3) and 8(d) by engaging in bad-faith bargaining. Section 8(d) of the Act requires parties "to meet at reasonable times and confer in good faith" regarding terms and conditions of employment, but does "not compel either party to agree to a proposal or require the making of a concession."[4]

Here, the parties formally met only twice, on September 19 and November 14, to discuss the Employer's proposed VTO program. The two negotiating sessions on this subject lasted approximately 20 minutes in toto. During the first discussion on September 19, the Union asked two questions concerning the impact of the VTO program on the unit employees. The Union raised the same issues at the second meeting. A few days later, during a very brief discussion, Joyce asked Schwarz another question about how the VTO would affect the employees' pension plan. Schwarz informed Joyce that the VTO would not have a negative impact on the pension plan during the same conversation in which she announced that the Employer planned to implement its VTO program. The Employer then implemented the VTO before it addressed the remaining questions that the Union had raised.

I would not find that the Respondent Union bargained in bad faith on these facts. Because the parties engaged in only very brief negotiations on this subject over a period of a few months, this case presents a situation where there was insufficient bargaining over the Employer's VTO proposal to warrant finding that the Union bargained in bad faith. Although stating unequivocally its disinterest in the program, the Union, as noted, asked questions concerning the impact of the VTO program on other employment terms that the Employer did not address during negotiations. This lack of substantial discussion over the VTO program precludes any possibility that the Union's stated unwillingness to agree to any such program for full-time employees could be viewed as a refusal to bargain at this point.[5]

[2] Although the Union argued at the hearing that this case should be deferred to the parties' grievance-arbitration procedure, the Union has not excepted to the judge's finding that deferral is inappropriate here, as the majority notes.

[3] Based on this testimony, the GC amended the complaint at the hearing to allege that, in addition to the Union's conduct in threatening to fine and fining employee members, Cogswell's remarks threatening revocation of membership further violated Sec. 8(b)(1)(A) of the Act.

[4] See *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

[5] I do not mean to suggest that the Employer bargained in bad faith, particularly in the absence of any charge alleging such violation.

Thus, the Union's intransigent rhetoric, not at all unusual during preliminary negotiations, must be viewed in context. The Union willingly discussed the Employer's VTO proposal, asked pertinent questions, and stated its adverse position during the limited negotiations on the subject. The Act, as stated, does not require concessions by either side during the course of bargaining.[6] In these circumstances, the General Counsel has failed to establish by a preponderance of the evidence that the Union's conduct rose to the level of bad faith bargaining. Accordingly, I would dismiss this complaint allegation.[7]

8(B)(1)(A) ALLEGATIONS

Internal union discipline, such as fining and expelling members, that affects only an employee's relationship with the union is governed by the test set forth in *Scofield*, supra. In that case, the Supreme Court said:

> Section 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. (394 U.S. at 430).

The Supreme Court later held in *Pattern Makers v. NLRB*, 473 U.S. 95 (1985), that members are free to escape union discipline by resigning their union membership. Further, where the collective-bargaining agreement contains a union security clause, employees can seek financial core membership to avoid any possibility of union discipline. Id. at 106, fn. 16.

The Union in this case threatened to fine and possibly expel employee members who participated in the VTO program that the Employer had established without the Union's approval. Thereafter, pursuant to the action of its Trial Board, the Union fined 71 members who ignored the Union's repeated warnings and accepted VTO under the Employer's program. Although the Union's threats to employee members and its later disciplining of them clearly pertained to internal union matters, the General Counsel argues that the Union violated the proscription in *Scofield* against impairing "a policy Congress has imbedded in the labor laws" when it "blatant[ly] attempt[ed] to unilaterally rescind . . . the 1997 Agreement." As the General Counsel points out, the Board held in *Norwalk Typographical Union No. 529 (The Hour Publishing Co.)*, 241 NLRB 310, 314–315 (1979), that the union violated Section 8(b)(1) by threatening to fine employee members for performing overtime work required by the collective-bargaining agreement in a unilateral attempt to change these provisions.[8]

Contrary to the General Counsel, I do not find that the Union's treatment of its employee members impaired any statutory labor law policy. In *The Hour Publishing Co.*, the Board found that the union there violated the Act by attempting to prevent employees from complying with a contract provision where their refusal to work mandatory overtime could have resulted in their discharge. However, the Board has drawn a clear distinction between voluntary and mandatory overtime work in determining whether, under otherwise similar circumstances, an employee's refusal to perform it was protected.[9] In a case similar to this one, the Board's finding that the union's fining employees who violated its prohibition on performing overtime work was contrary to *Scofield* was expressly based on the distinction between whether the work at issue was voluntary or mandatory overtime.[10] Further, in this regard, the Second Circuit, adopting a Board's similar finding that the union's discipline of members for refusing to adhere to its ban on mandatory overtime work violated Section 8(b)(1)(A), stated that "the law allows a union to take disciplinary action against a member for refusing to engage in protected activity that will not jeopardize his job."[11] Therefore, because the Employer's VTO program in this case was a *voluntary* benefit conferred on employees who were not subject to lawful management discipline for failing to utilize it, the present situation is distinguishable from the case relied on by the General Counsel and similar precedent in which the unions disciplined employees for performing mandatory overtime or other work re-

[6] *Dura Fittings Co.*, 121 NLRB 377, 383 (1958).

[7] In considering the parties' 1997 agreement relating to the creation of a VTO program, the judge found that "nowhere in that agreement does it specifically say that full-time and part-time employees *must* take part in any VTO program." (Emphasis in original.) I find, contrary to the judge, that the agreement itself is ambiguous, at the least, as to whether full-time employees necessarily must be included in the VTO program. Nonetheless, even assuming that the judge erred in denying the General Counsel's proffer of extrinsic evidence purportedly to clarify this ambiguity, I conclude that the judge's evidentiary ruling was insufficient to affect the result here. See *Des Moines Register & Tribune Co.*, 339 NLRB No. 130, slip op. at 3–4 (2003).

[8] The Board similarly held in a recent decision, *Teamsters Local 896 (Anheuser-Busch)*, 339 NLRB No. 91 (2003), that the union acted unlawfully when it sought to have employees act in contravention of the bargaining agreement by threatening to discipline them for reporting safety violations by fellow employees. See also *Communications Workers Local 13000 (Verizon Communications)*, 340 NLRB No. 2, slip op. at 10–15 (2003) (union violated Sec. 8(b)(1)(A) by prosecuting and fining employee members for performing mandatory overtime work).

[9] *Imperial Foods*, 287 NLRB 1200, 1203–1204 (1988).

[10] *Verizon Communications*, supra at fn. 8.

[11] *Graphic Arts Local 13-B (Western Publishing Co.)*, 252 NLRB 936, 938 (1980), enfd. 682 F.2d 304 (2d Cir. 1982), cert. denied 459 U.S. 1200 (1983).

quirements. Accordingly, the Union did not violate Section 8(b)(1)(A) here.

For these reasons, I find that the Union was not acting unlawfully in employing threats and fines as a means to dissuade employee members from participating in the Employer's VTO program. Accordingly, I agree with the dismissal of the 8(b)(1)(A) allegation.

Dated, Washington, D.C. February 27, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

J. Edward Castillo, Esq., for the General Counsel.

Charles A. Werner, Esq., of St. Louis, Missouri, for Respondent Union.

James D. Weiss, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On May 13, 2002, Commonwealth Edison Company (Com Ed or Charging Party and Employer), filed a charge in Case 13–CB–17070 against Local Union 15, International Brotherhood of Electrical Workers, AFL–CIO (Respondent or Union).

On July 2, 2002, the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint alleging that the Respondent violated Section 8(b)(3), 8(d), and 8(b)(1)(A) of the National Labor Relations Act (the Act), when it bargained in bad faith with Com Ed over a voluntary time off (VTO) program which Com Ed later implemented and when it threatened to discipline and did discipline members of the Union for participating in the voluntary time off program (VTO).

Respondent filed an answer in which it denied that it violated the Act in any way. A hearing was held before me on January 22, 23, and 24, 2003, in Chicago, Illinois.

Based on the entire record, including my observation of the demeanor of the witnesses, and after considering briefs submitted by the General Counsel, Respondent, and the Charging Party, I make the following

I. FINDINGS OF FACT

At all material times, Com Ed, a corporation, with offices and places of business in northern Illinois, has been engaged in the business of distributing and transmitting electrical power to residential and commercial customers in the State of Illinois.

Respondent admits, and I find, that at all material times, Com Ed has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times, Respondent, Local Union 15, IBEW, AFL–CIO, has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

For many decades Local 15 or predecessor unions have represented employees of Com Ed. In 1994, Local 15 merged with 16 other locals and currently represents approximately 8000 employees.

More specifically the Union has represented those employees of Com Ed who work in what is referred to in this litigation as call centers.

There are two call centers: one in Oak Brook, Illinois, called the Oak Brook Call Center and one in Chicago, Illinois, called the Chicago North Call Center. Between the two call centers there are approximately 320 full-time customer service representatives and 130 part-time customer service representatives. Two hundred and fifty two (252) employees represented by the Union work at the Oak Brook Call Center that operates on a 24-hour, 7-day a week schedule. One hundred and ninety eight (198) employees represented by the Union work at the Chicago North Call Center that operates on a Monday through Saturday 7 a.m. to 10 p.m. schedule. The Chicago North Call Center is closed on Sunday.

For many years employees could get what was referred to as "4x" time. In Com Ed's payroll system a "4" is time off without pay and a "5" is time off with pay. "4x" time is time off without pay granted by a supervisor to a call center employee who, for example, needed time off for a personal reason such as illness of a family member or attending a conference at his or her child's school.

The customer service representatives (CSRs) handle, among other things, customer phone calls about loss of power, calls regarding restoring cut off power service, billing, and other service questions. The spring and summer bring many calls regarding loss of power because of increased electrical storms and calls regarding restoring power service go up in the spring because by law power can't be cut off if the temperature falls below 32 degrees Fahrenheit and it gets cold in northern Illinois.

Accordingly the need for CSRs fluctuates and is greatest when electrical storms are in the area and customers are calling to report a loss of service.

On April 7, 1997, the parties, Com Ed and the Union, had executed a written letter of agreement, which was several pages in length and provided, in pertinent part, i.e., section VI, C, as follows:

> In addition, the issue regarding excused unpaid (4x) time for personal reasons has been addressed. Both parties agree that employees may, on a volunteer basis, be released during certain periods of the week, as determined by Management, without pay. Management will make every effort to schedule excused unpaid time equally among call centers. The determination as to how many employees should be released will be decided by the Call Center Management.
>
> Company and Union representatives will jointly work toward developing guidelines, which addresses both par-

> ties' interests. These guidelines shall be in place *prior* to enacting the above provision [Emphasis added].

Between April 7, 1997, and September 19, 2001—a period of almost 4-1/2 years Com Ed and the Union *never* discussed the implementation of a voluntary time off program (VTO).

This case can be broken down into two parts. The first part is whether the Union violated Section 8(b)(3) and 8(d) by refusing to bargain in good faith with Com Ed about the implementation of a VTO or not.

Suffice it to say Com Ed and the General Counsel maintain the Union didn't bargain in good faith and Com Ed was lawfully entitled to implement the VTO program it implemented on December 21, 2001.

The second part of this case is following implementation of the VTO program, did the Union violate Section 8(b)(1)(A) of the Act when it threatened to discipline employees for participating in the VTO program, did discipline employees by fining them, and did sue to collect the fines in civil court in Illinois.

B. Did the Union violate Section 8(b)(3) and (d) of the Act

Phyllis Batson is the director of customer service for the customer care organization. She began her employment with Com Ed on February 5, 2001. She was aware of "4x" time wherein individual supervisors in the call centers would grant time off without pay to employees for personal reasons but was not aware of the April 7, 1997 letter agreement between Com Ed and the Union which contained the language quoted above.

Batson felt that a program for voluntary time off should be administered more centrally and should be driven by the needs of the business. She also felt that the call centers were overstaffed. Accordingly, on September 19, 2001, she and others from management met with the Union at the Oak Brook Call Center to discuss six separate items on a written agenda prepared by management one of which, the third item, was the "VTO Program."

Three of the seven attendees present at the September 19, 2001 meeting testified before me as to what was said. Batson testified, as did the union vice president and now President Robert Joyce and then chief steward at the Oak Brook Call Center and now Business Agent Debbie Cogswell.

All three witnesses, Batson, Joyce, and Cogswell agree that time spent on the VTO program was short and that Joyce speaking for the Union was not interested in a VTO program for full-time employees. Cogswell estimated that the time discussing the VTO program on September 19, 2001, was no more than 15 minutes. The Union has several questions for management, i.e., how would call outs work when a person is called back after being on VTO, how would the 16-hour rule work, i.e., full-time employees could be required to work 16 hours if necessary and the question was would the 16 hours run from the normal start of shift or would the 16 hours start to run from the time the employee was called back in, and what would happen if an employee was denied a vacation day, which is time off with pay on a particular day and later VTO or Voluntary Time Off is made available that day. The April 7, 1997 letter agreement was not mentioned by either side at the September 19, 2001 meeting.

I credit Joyce and Cogswell that the Union was opposed to VTO for full-time employees feeling, obviously, that the VTO program could result in less paid hours of work for the employees the Union represented. In its May 9, 2002 edition of Unity, the union newsletter, the following language suggests why the Union opposed VTO for full-time employees:

> Several months ago, ComEd Human Resource Representatives and Call Center management approached Local 15 officials concerning the company's ability to allow Customer Service Representatives to leave work on Unpaid Leave when customer call volume may be low.
>
> Recognizing the Contract does not allow that provision, but obligates management to provide eight (8) hours of work to any and all employees that report for duty, Local 15 declined the company's offer.
>
> Despite the Union's concerns, management offered this option to its Customer Service Reps. Immediately, the Union advised its affected members both verbally and in posted notices, that any member found to be acting in a manner that is not in the best interest of Local 15 would have appropriate charges filed against them with the Union's Trail [sic] Board.
>
> Since the company began offering its CSR's this option, the members that have accepted the company's option of Unpaid Time off have prompted Call Center management to proudly boast that with all the Voluntary Time Off (VTO) hours, they may not need approximately 5–10 full time Customer Service Representatives.

[GC Exh. 17.]

Deborah Schwarz is Labor Relations Liaison for Com Ed. She was not at the September 19, 2001 meeting and in fact didn't start working for Com Ed until September 24, 2001.

Oak Brook Call Center Manager Cynthia Crawford spoke to Schwarz about the VTO program. Schwarz contacted Linn Lasater who is director of employee and labor relations for Exelon Corporation, the parent company of Com Ed. Lasater got a copy of the April 7, 1997 letter agreement to Schwarz.

Meanwhile Work Force Manager Oscar Valasquez prepared some guidelines for the VTO program.

There were no meetings between management and the Union on the VTO program between September 19, 2001, and a meeting held on November 14, 2001. The November 14, 2001 meeting between management and the Union was to discuss a pilot program called the Business Customer Service Team Program (BCST).

At the end of the meeting Phyllis Batson for management asked the Union if they could discuss the VTO program. The Union said they could. Present for Com Ed were Phyllis Batson and Deborah Schwarz and present for the Union were Robert Joyce and Debbie Cogswell. Again the discussion on the VTO program was not lengthy and lasted only about 5 minutes.

Batson placed the guidelines for the VTO program prepared by Valasquez on the table and Joyce and Cogswell looked at them.

Joyce immediately said that the Union was not interested in a VTO program and the employer had to give the employees 40

hours. Schwarz said it was voluntary and would be good for the employees. Joyce reiterated that employees should get their 40 hours.

Management then produced the April 7, 1997 letter agreement and Schwarz read out loud the first paragraph, which read as follows:

> In addition, the issue regarding excused unpaid (4x) time for personal reasons has been addressed. Both parties agree that employees may, on a volunteer basis, be released during certain periods of the week, as determined by Management, without pay. Management will make every effort to schedule excused unpaid time equally among call centers. The determination as to how many employees should be released will be decided by the Call Center Management.

Joyce then said, read the second paragraph, as well, the second was read. The second paragraph reads as follows:

> Company and Union representatives will jointly work toward developing guidelines which addresses both parties interests. These guidelines shall be in place prior to enacting the above provisions.

Joyce then said that he might be willing to look at a pilot program for part-time employees but the Union was not interested in a VTO program for full-time employees who, of course, were still eligible for "4x" time.

Management had no answer to the Union's question of when the 16 hours starts to run if a person released on VTO is later recalled to work because of an electrical storm or some other reason. Management also had no answer for the Union's question of what happens to a person who is denied vacation (time off with pay), comes to work, and VTO (time off without pay) is offered. What happens? Com Ed had no answer for the Union.

Schwarz agreed that Joyce clearly indicated that the Union was not interested in a VTO program for full-time employees because they were entitled to 40 hours and after the April 7, 1997 letter agreement was produced, Joyce said the Union might consider a pilot VTO program for part-time employees.

Both Batson and Schwarz agreed that prior to the implementation of the VTO program on December 21, 2001, the parties had *not* agreed to guidelines, which address both parties, management and union, interests. There were no guidelines in place prior to management implementing the VTO program.

Joyce and Cogswell testified, and I credit their testimony that the Union's position was as follows: the Union was *not* interested in a VTO program for full-time employees but would consider a VTO program for part-time employees.

The same issues raised by the Union at the September 19, 2001 meeting were raised in the November 14, 2001 meeting. Management was to get the answers.

On November 19, 2001, Deborah Schwarz went to the union hall on an unrelated matter and ran into Bob Joyce. She asked Joyce about the VTO program and Joyce, according to Schwarz, said he had talked to someone—she doesn't remember who—and the Union wasn't interested in any VTO program. Joyce also mentioned the adverse impact working less hours may have on an employee's pension.

Joyce's recollection is that his encounter with Schwarz at the union hall lasted 10 or 15 seconds and he told her that he had no interest in a VTO program if it included full-time employees.

On December 18, 2001, according to Schwarz, she called Joyce about the VTO program and Joyce told her that the Union was not interested in a VTO program for full-time employees who had to work and should work 40 hours a week. Schwarz told Joyce that Com Ed was implementing a VTO program for full-time and part-time employees. She testified that Joyce told her he would see her in court and hung up the phone.

Joyce spoke with Schwarz on December 18, 2001, but couldn't recall if they spoke face to face or over the phone. Suffice it to say he testified that Schwarz told him that an employee's reduced hours because of VTO would not adversely affect the employee's pension.[1] Joyce told Schwarz as he had told her and Batson at the November 14, 2001 meeting and as he had told Schwarz on November 19, 2001, at the union hall that the Union was not interested in any VTO program for full-time employees but would be interested in a VTO program for part-time employees. Schwarz told Joyce that Com Ed was implementing the VTO program for full-time and part-time employees. Joyce told Schwarz he would file a grievance and see her in court. Management faxed over the guidelines for the VTO program to the Union on December 18, 2001. The VTO program began on December 21, 2001.

The Union filed a grievance on December 21, 2001. The grievance was as follows:

> Management (Phyllis Barson & Debbie Swart)[2] have instituted a Voluntary Time Off Program (VTO) to allow CSR's to volunteer to go home early unpaid. These types of programs are subject to negotiations with Local 15, which was not done. Resolution: The Union demands that this program cease immediately and management negotiate such a program with Local 15. The Union also demands that any employee who has been allowed to go home early be paid for the day.

The grievance was denied at Steps 1, 2, and 3. The grievance is scheduled to be heard by an arbitrator on April 10 and 11, 2003.

Com Ed filed a charge with Region 13 on May 13, 2002, alleging that the Union did not bargain in good faith regarding the VTO program in violation of Section 8(b)(3) and 8(d) of the Act. The Union submits that this entire case should be deferred to the arbitral process. The General Counsel and Charging Party opposed deferral and I agree. Under *United Technologies Corp.*, 268 NLRB 557 (1984), the allegations against the Union are not the kind of allegations suitable for arbitration.

I find that the Union did *not* fail to bargain in good faith in violation of the Act with respect to the VTO program.

The witnesses for Com Ed—Phyllis Batson and Deborah Schwarz—agreed with union witnesses Bob Joyce and Debbie Cogswell that there was no agreement on guidelines prior to

[1] Apparently because VTO hours (off without pay) count for pension purposes as hours worked.

[2] Should read Batson and Schwarz and not Barson and Swart.

Com Ed's unilateral implementation of the VTO program and guidelines on December 21, 2001. The plain language of section VI, C of the letter agreement of April 7, 1997 (GC Exh. 2), requires such an agreement on guidelines as a condition precedent to implementation of the VTO program. I also find that the Union did not bargain in bad faith in regards to reaching an agreement on guidelines.

On November 14, 2001, management presented a copy of guidelines they had prepared to the Union (GC Exh. 3). Without any further discussion whatsoever the guidelines implemented on December 21, 2001, were different from the ones shown the Union on November 14, 2001, e.g., bullet one is different between the proposed and implemented guidelines,[3] bullet two in the proposed guidelines limited VTO to Monday through Friday whereas the implemented guidelines placed no such limit on VTO and as noted, Oak Brook Call Center is open 7 days a week and Chicago North is open Monday through Saturday, and, lastly, a bullet not contained in the proposed guideline is in the implemented guidelines.[4]

Section 8(b)(3) of the Act makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer."

Section 8(d) of the Act provides in part that the duty to bargain collectively is the mutual obligation of the employer and the Union "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(d) also provides that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession."

In this case the Union met and discussed the VTO program each and every time they were asked to do so by management. The Union discussed the VTO program at the agenda meeting on September 19, 2001, which discussion on VTO lasted no more than 15 minutes, the Union discussed the VTO program for 5 minutes at the November 14, 2001 meeting. On November 19, 2001, and December 18, 2001, the conversations between management and the Union lasted a matter of seconds. Com Ed was too quick to declare impasse and unilaterally implement the VTO program.

The April 7, 1997 letter agreement covered full-time and part-time employees at the call center but nowhere in that agreement does it specifically say that full-time and part-time employees *must* take part in any VTO program.

It seems clear that the Union never refused to meet and discuss the guidelines for the VTO program and, therefore, I must conclude that the Union did not violate Section 8(b)(3) and (d) of the Act.

C. Union Discipline of Members Who Participated in the VTO Program Unilaterally Implemented by Com Ed on December 21, 2001

The Union immediately filed a grievance over Com Ed's implementation on December 21, 2001, of the VTO program.

It is uncontested that the Union took certain actions thereafter.

On December 20, 2001, the Union, by Bob Joyce, sent out the following notice to all call center employees:

> December 20, 2001
>
> To: All Call Center Employees:
>
> Call Center Management has just informed me that going forward management will be asking Call Center employees to sign up to voluntarily go home early *UNPAID*.
>
> Local 15 has informed management that this is subject to negotiation and per the contract (Article IV, Section 19) "all employees who report to work for their basic workday, and in condition to perform their work, will be provided with work in their classification or other work, during the hours of their work schedule for that day". This means you are guaranteed to work and be paid for 40 hours for full time employees and either 20 to 24 hours or 8 to 32 hours for part-time employees. Management is trying to get around this issue.
>
> Local 15 is asking that *no* Call Center employees volunteer for this *UNPAID* early Release Program. This program is being designed by management to see how many full time and part-time positions can be abolished in the Call Center. Also, management is asking you to volunteer to go home early *UNPAID* but on the other hand management is saying they need all their employees and are planning to reduce the vacation quota from 20% per day to 12% per day. if they want an employee to go home early *UNPAID* why is Call Center Management reducing the number of employees who can be off on vacation per day, management should be raising the vacation quota number above 20% per day.
>
> Your support and not volunteering to leave early *UNPAID* is greatly appreciated. If you have any questions, you can contact me at the office . . . or see your Union Steward."

Cogswell testified that if an employee requested VTO, the Union would place another copy of the December 20, 2001 letter in the employee's mailbox, and would send an e-mail message to the employee that there was mail from the Union in the mailbox. The Union posted the names of its members who requested voluntary time off without pay on the union bulletin boards at the call centers.

The Union sent a letter to the employees on February 4, 2002, thanking those employees in the call centers who have not participated in the VTO program. The letter stated that the Union would continue to post the names of those participating

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[3] The first bullet in the proposed guideline is as follows:

> Voluntary unpaid Time Off (VTO) will be offered at Management's discretion based on service level, availability, anticipated call volume, historical data, weather conditions, outages, CSR schedules (training, etc.) and anticipated events.

The implemented first bullet in the guidelines is as follows:

> Voluntary unpaid Time Off (VTO) will be offered at Management's discretion based on various factors such as, but are not limited to, service level, availability, anticipated call volume, historical data, weather conditions, outages, CSR schedules (training, etc.), and anticipated events.

[4] Full day VTO will not be offered on days that are closed for vacation allotments.

in the VTO program on the union bulletin boards, would list their names in the *Unity* newsletter, and charges would be filed with the union executive board to fine the union members. The letter stated that the continuing nonsupport of a Local 15 request and their continuing ability to put the livelihoods of other Local 15 members in jeopardy would not be tolerated. Copies of *Unity* newsletter with the names of the union members participating in the VTO program were admitted into evidence.

A separate letter was sent out to union members who participated in the VTO program a second or more times, with notice that charges would be filed with the executive board, as well as the listing of names on the union bulletin boards and in the *Unity* newsletter. This form letter was sent to individual union members who requested VTO on more than one occasion.

The evidence established that charges were filed under the IBEW International Constitution against call center union members, notifying the members of the specific provision of the IBEW International Constitution that was violated, and the date of the hearing before the executive board, which serves as the trial board. The charges allege that the member violated the following section of the IBEW Constitution:

> Article 25, Section 1, paragraph (e):
>
> (e) Engaging in any act or acts which are contrary to the member's responsibility toward the I.B.E.W., or any its L.U.'s, as an institution, or which interferes with the performance by the I.B.E.W., or a L.U. with its legal or contractual obligations.

A hearing was held for every union member receiving the charges, whether or not the member appeared for the hearing. Members fined by the trial board received a fine of $281 if they did not show up for the hearing, and a fine of $218 if the member showed up and participated in the hearing. Every member who was fined received a letter stating the results of the hearing, the amount of the fine, and the appeal procedure for filing an appeal of the fine under the IBEW International Constitution.

Members were told that if they did not appeal the fine, pay the fine, or make arrangements for paying the fine, that the Union would bring suit in the small claims court of Illinois to collect the fine. Joyce testified that the practice of the Union over the years was to file suit in small claims court for the collection of fines.

A list of the names of the members, dates of violation, dates of charges, dates of hearing, the action of the trial board, whether the fine was paid and/or appealed, and whether the Union has filed suit to collect the unpaid fine was admitted as General Counsel Exhibit 21.

In all, 77 members were disciplined and fined either $281 or $218. A small percentage paid the fine. Most did not appeal. The Union is going to court against 71 members to collect the fine.

Two of the 77 members disciplined by the Union for participating in the VTO program testified at the hearing before me, i.e., Sheri Flaig and Charmaine Rodez.

Flaig is a part-time CSR who was fined $218 after a hearing at which she appeared after receiving a notice of trial board hearing. She used VTO three times. The first two times were when first her grandfather and then her grandmother were ill and she had to leave work to see them. She was told by management "4x" time was not available. The third time she used VTO she didn't ask for "4x" time before applying for VTO.

Rodez is a full-time CSR and claims she used VTO only once but the union records reflect she used VTO twice. The notice of hearing was sent to the address the Union had for her but she had moved and not given the Union her new address and she never received a notice of trial board hearing and, as a result, did not attend the hearing. She was fined $281.

Rodez claims the only time she used VTO was because she had an emergency with her daughter and was denied "4x" by management. Since then she had asked for and received "4x" time.

Neither Flaig nor Rodez appealed their fines although given an opportunity to do so since they received in person letters informing them of their right to appeal as follows:

> The Trial Board of Local Union 15 refers you to Article XXV, Section 12 of the IBEW Constitution which read as follows:
>
> Any member who claims an injustice has been done him/her by an L.U. or trial board, may appeal to the International Vice President any time within forty-five (45) days after the date of the action complained of.
>
> A copy of any appeal must be filed with the local union.
>
> If an assessment has been levied, also Article 25, Section 13 of the IBEW Constitution which reads as follows:
>
> No appeal for revocation of an assessment shall be recognized unless the member has first paid the assessment, which he/she can do under protest. When the assessment exceeds fifty (50) dollars, payments of not less than ($40.00) dollars in monthly installments must be made until the assessment is paid or until the assessment is paid or until a final decision on the appeal is made, whichever occurs first. The first monthly installment must be made within fifteen (15) days from the date of the decision rendered and monthly installments continued thereafter or the appeal will not be considered.
>
> If you have any questions regarding the above quoted article or sections of the Constitution, you are to contact the Chairman of the Executive Board for clarification or assistance as soon as possible.

Rodez testified she later received "4x" time and the only time she used VTO was because she was told there was no "4x" time. The Union may want to reconsider the Rodez case.

Cogswell testified that if someone promptly brought to the Union's attention that they had an emergency and were denied "4x" time that use of VTO would not count against them. Neither Flaig nor Rodez promptly brought to the Union's attention their denial of "4x" time and the nature of their emergency.

Flaig, Rodez, and the others can tell his or her story to the State court when the Union seeks collection of the fine.

Both Flaig and Rodez signed obligation cards when they joined the Union which read that they "promise and agree to conform to and abide by the Constitution and laws of the I.B.E.W. and its Local Unions."

Section 8(b)(1)(A) of the Act provides that "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, that the paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Section 7 of the Act provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

A union may fine or discipline a member without violating Section 8(b)(1)(A) of the Act so long as the fine or discipline "impairs no policy which Congress has imbedded in the labor laws." *Scofield v. NLRB*, 394 U.S. 423 (1969). Unions may impose fines for breaches of internal union rules without restraining or coercing employees within the meaning of the Act. The Supreme Court held in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), that a union may seek enforcement in State court of such fines in cases where the employee enjoys "full membership" in the union. In *NLRB v. Allis-Chalmers Mfg. Co.*, supra, the Supreme Court held that it was not a violation of Section 8(b)(1)(A) of the Act for the Union to fine and seek collection in Court for fines imposed because members crossed a picket line during a strike and went to work.

In 1969 the Supreme Court decided *Scofield v. NLRB*, supra, upholding the legality of fines of members. The union promulgated a rule designed to discourage employees engaged in piecework operations from exceeding a production ceiling. Members who demanded full payment when they exceeded the production ceiling were subject to a fine. The Board found no violation and the Seventh Circuit affirmed. The Supreme Court listed four requirements for lawful imposition of union fines under the Act:

> [Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy which Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule. [394 U.S. at 430.]

The fine should not be unreasonably high. In this case Debbie Cogswell testified as follows as to why the fines were either $218 or $281 if the union member was found guilty:

> ADMIN. LAW JUDGE LINSKY: Let me ask you this. How did you come up with the fine of either $218 or $281?
>
> THE WITNESS: What they did was they, the executive board calculated out all the expenses of having the business reps there, the pay for every executive board member that the union was paying, totaled that up by the number of people that were charged. Then the people that showed up and testified got their fines reduced by $50, because they made the attempt to come to explain. And we upped the fine of the people who didn't show up, never called, never did anything, we upped, turned that $50 over to them. So all it did was reimburse the union for expenses.

Even with a union-security clause members can escape discipline by the Union by becoming financial core members.

It is no offense to labor law policy for a Union to require its members not to participate in a voluntary time off program (VTO). If a Union can lawfully fine members for crossing a picket line and going to work it can lawfully fine a member for violating the union constitution by applying for VTO.

This is especially so in light of the fact that "4x" time still exists and employees can request "4x" time off without pay if an emergency situation comes up. Employees also can qualify for time off under the Family and Medical Leave Act.

At the hearing the General Counsel moved to amend the complaint to allege that the Union violated Section 8(b)(1)(A) of the Act when the Union, by Debbie Cogswell, threatened to revoke the union cards of those members who participated in the VTO program.

Cogswell admitted that she may have said that employees may have union cards pulled if they don't pay the fine but that was before the Union knew exactly what it was going to do to enforce the ban against employees participating in the VTO program i.e., if guilty fine them and go to court to collect. No member ever had their union card revoked or pulled but in fact the Union under Section 8(b)(1)(A) of the Act can prescribe the rules with respect to the acquisition or retention of membership in the Union. I find no violation of the Act.

Accordingly, I find that the Union did not violate Section 8(b)(1)(A) of the Act when it disciplined as it did certain members for violating an internal union rule by participating in the VTO program.

CONCLUSIONS OF LAW

1. Respondent, Local Union 15, International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. Commonwealth Edison Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent did not violate the Act as alleged in the Complaint.

On the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.[6]

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Dated, Washington, D.C. April 23, 2003

[6] The Charging Party's motion to correct transcript is granted.